App. at 3-4. The court also reinstated its initial opinion. Pet. App. at 4.

A motion for rehearing and rehearing *en banc* was timely filed. The Eighth Circuit denied the motion for rehearing and/or rehearing *en banc* on July 28, 2005. Pet. App. at 26.

REASONS FOR GRANTING THE PETITION

I. The Sentence of 360 Months Imprisonment, Which is an Upward Departure from an Advisory Guideline Range of 210 to 262 Months, Constitutes an Unreasonable Sentence Under the Framework Established in *United States v. Booker*, 125 S. Ct. 738 (2005).

Recent Supreme Court decisions have impacted federal sentencing procedures. Although the Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005) brought some needed clarity to the Sentencing Guidelines, lower courts have continued to address certain legal issues after the *Booker* decision that remain unsettled. One of the most significant issues is the reasonableness review of a sentence on direct appeal. The petitioner's sentence is a striking example of why the Supreme Court should further define the scope and extent of the reasonableness review statutorily required by *Booker*.

Booker applies in this instance because the case was pending direct review when *Booker* was decided. *Booker*, 125 S. Ct. at 769; *Griffith v. Kentucky*, 479 U.S. 314, 328 (1997). The remedy portion of *Booker* severed and excised the provisions of the Sentencing Reform Act which made the Sentencing Guidelines mandatory. *See Booker*, 125

S. Ct. at 756-57. Because the Guidelines are now advisory, a sentencing court must still consider the applicable guideline range, but is also permitted to tailor a particular sentence in light of other factors, such as the statutory sentencing factors set out in 18 U.S.C. § 3553(a). *Booker,* 125 S. Ct. at 757.

The Court's decision in *Booker* also addressed the proper appellate review of criminal sentences under the new advisory guidelines sy tem. An appellate court will now review a criminal sentence to determine whether it is reasonable or unreasonable. *Booker,* 125 S. Ct. at 765. The reasonableness review must be conducted with regard to the factors set forth in 18 U.S.C. § 3553(a). *See id.* at 765-66 ("Those factors [in section 3553(a)] in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.").

The Eighth Circuit in this case did not conduct a meaningful reasonableness inquiry. In other recent decisions, the Eighth Circuit has conducted a significant reasonableness review by specifically weighing and discussing the various factors listed in 18 U.S.C. § 3553(a). *See, e.g., United States v. Hadash,* 408 F.3d 1080, 1084 (8th Cir. 2005); *United States v. Haack,* 403 F.3d 997, 1002 (8th Cir. 2005); *United States v. Pizano,* 403 F.3d 991, 995 (8th Cir. 2005); *United States v. Rogers,* 400 F.3d 640, 642 (8th Cir. 2005). In this case, however, the Eighth Circuit summarily indicated that the 3553(a) factors were brought to the attention of the district court in a downward departure motion. Pet. App. at 3. The Eighth Circuit concluded that "*Booker* did not change anything about this case factually or legally." Pet. App. at 2. The opinion also suggests that the appellate court conducted a reasonableness inquiry in its first opinion. Pet. App. at 3-4.

The Eighth Circuit's conclusion that the district court already considered the 3553(a) factors when it denied the downward departure motion overlooks the point that the initial sentence was determined under a pre-*Blakely* and pre-*Booker* mandatory guideline scheme. Although the district court at the sentencing hearing made a brief, oral reference to 18 U.S.C. § 3553(a),[2] the district court's sentencing determination was made under a mandatory guideline scheme, where the 3553(a) factors could not receive equal weight as the Sentencing Guidelines. *See also United States v. Booker,* 125 S. Ct. 738, 750 (2005). A reviewing court cannot simply defer to a brief reference to 3553(a) when the sentencing court was operating in a pre-*Blakely* and pre-*Booker* era where it could not impose a non-guidelines sentence based solely on the 3553(a) factors. Although a sentencing court may have concluded that certain factors did not warrant a downward departure, those same factors may now be properly considered under 3553(a) on the very different issue as to whether a guidelines or non-guidelines sentence is reasonable. A remand is required for the lower court to fully weigh the 3553(a) factors in analyzing whether the sentence is unreasonable.

The Eighth Circuit opinion also suggests that it conducted a reasonableness inquiry in the first appeal. Pet. App. at 3-4. The first opinion, however, did not contain any meaningful reasonableness inquiry. The initial opinion did not in any fashion consider the 3553(a) factors or weigh whether those factors would support a "non-guidelines"

[2] There was no reference to the 3553(a) factors in the district court's written order specifying the reasons for the upward departure. *See* Pet. App. at 18-23.

sentence. There are only two references in the initial opinion that even remotely touch upon reasonableness where the court indicates that the grouping rules "fully justified" the three level departure and that departure for psychological injury "justified the full extent" of the upward departure. Pet. App. at 12, 16. These brief references to the extent of the departure do not constitute a meaningful or complete review of reasonableness where the 3553(a) factors should be specifically considered and weighed by the reviewing court.

Recent opinions from the Eighth Circuit demonstrate that the new reasonableness review now required by *Booker* may be illustrative of the concerns expressed by Justice Scalia in his dissenting opinion in *Booker*:

> What I anticipate will happen is that "unreasonableness" review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial majority's sanguine claim that "no feature" of its avant-garde Guidelines system will "ten[d] to hinder" the avoidance of "excessive sentencing disparities."

United States v. Booker, 125 S. Ct. 738, 794-95 (2005) (Scalia, J., dissenting). For instance, in *United States v. Rogers,* 400 F.3d 640 (8th Cir. 2005), the court reversed a sentence of probation from a guideline range of 51 to 63 months on a reasonableness review. Similarly, in *United States v. Haack,* 403 F.3d 997 (8th Cir. 2005), the Eighth Circuit reversed a downward departure to a total sentence of 78 months from an 87 to 108 month applicable guideline range, with a consecutive 60 month sentence for a firearms offense, on reasonableness grounds. In contrast to *Haack* and *Rogers,* the Eighth Circuit recently affirmed a

sentence of 60 months on reasonableness grounds, which was the result of a downward departure from a 240 month statutory minimum sentence and a guideline range of 135 to 168 months. *See United States v. Christenson*, 403 F.3d 1006 (8th Cir. 2005). On rehearing *en banc* in *Christenson*, the district court's judgment was affirmed by "an equally divided court." *United States v. Christenson*, 424 F.3d 852 (8th Cir. 2005). In *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005), the court affirmed on reasonableness grounds an 18 month sentence from an applicable guideline range of 70 to 87 months. Although the court attempted to apply the 3553(a) factors, the obvious result of these decisions is disparity and inconsistency.

The Eighth Circuit has also recently acknowledged that its description of a reasonableness review has "differed slightly" from case to case. *See United States v. May*, 413 F.3d 841, 844-45 (8th Cir. 2005) ("If any inconsistency exists among the standards articulated by this Court, we need not resolve it today, for May's sentence is reasonable and not an abuse of the court's discretion under any formulation."). The *May* decision cites other Eighth Circuit opinions that have applied differing standards to the reasonableness review. *See May*, 413 F.3d at 844 n.2.

These cases demonstrate that the Eighth Circuit's attempt at reviewing reasonableness on appellate review has not eliminated sentencing disparity or achieved uniformity. The Petition should be granted so that this Court can provide meaningful guidance to the lower courts for conducting a reasonableness inquiry that does not result in a "discordant symphony" of appellate court decisions reviewing criminal sentences.

The Petition should also be granted to provide further guidance to lower courts concerning the reasonableness of significant upward departures where the Guidelines encompass each feature of the defendant's conduct. In this case, there was a significant base offense level of 25, and upward guidelines adjustments for causing life-threatening bodily injuries, vulnerable victims, a large number of vulnerable victims, abuse of a position of trust, and grouping enhancements. The adjusted base offense level of 37 is in itself significant because it encompasses every aspect of the defendant's wrongful conduct. In other words, every sentencing aggravator has been accounted for in the adjusted base offense level. Therefore, the upward departure especially requires a reasonableness review under the *Booker* framework. In short, the significant upward departure from an adjusted base offense level of 37 must be subject to heightened scrutiny due to the severity of the sentence prior to the upward departure.

II. Whether the upward departure to 360 months imprisonment, from an applicable guideline range of 210 to 262 months, based on psychological injuries to the victims and the operation of the Guidelines grouping rules, constitutes an incorrect application of the Sentencing Guidelines, where there was a two level enhancement for vulnerable victims that encompassed psychological injuries, and where the grouping provisions of the Guidelines provide for a departure only if there are a number of units "significantly more than five units," when there were eight units in this case?

This Court recognized a core concern in *Apprendi* that a criminal defendant should have the "ability to predict

with certainty the judgment from the face of the felony indictment" or the four corners of the guilty plea. *Apprendi v. New Jersey*, 503 U.S. 466, 478 (2000). Although the Sentencing Guidelines are now advisory, they still serve the basic goal of Congress in diminishing sentencing disparities and increasing sentencing uniformity. *See Booker*, 125 S. Ct. at 759, 761. The Guidelines will serve no legitimate purpose if a particular defendant is subjected to numerous guideline adjustments that address every concern and factual issue in the case, but then be subjected to a significant upward departure that is related to the same guidelines adjustments. The Eighth Circuit's stated reasons for departure constitute an incorrect application of the Guidelines.

1. Departure Based on Psychological Injuries to Victims was not Justified by Factual Record, Demonstrating an Important Question of Federal Law that Should be Settled By this Court

The Eighth Circuit in its initial opinion found that there was sufficient evidence of psychological injuries to victims based on victim-impact letters contained in the presentence investigation report. Pet. App. at 13-16. The provisions quoted in the Eighth Circuit opinion include generalized descriptions of fear, stress, anxiety, anger, concerns about cancer, sleepless nights, doubts about treatment, and feelings of loss of self control. *Id.* Neither these provisions nor the opinion of the district court below identify a particular victim or their psychological condition in support of the departure decision. These excerpts do not specify particular psychological injuries, symptoms or diagnoses. There was no evidence adduced at the

sentencing hearing from mental health professionals. There was no evidence concerning psychological or psychiatric records demonstrating the presence of psychological injuries to support the upward departure decision. At best, the district court's opinion was a generalized speculation about the stress and anxiety of cancer patients. *See* Pet. App. at 16-18. This generalized statement is not sufficient grounds for an upward departure of this magnitude.[3]

The Sentencing Guidelines provide useful guidance as to whether psychological injuries are sufficiently "extreme" to warrant an upward departure:

> Normally, psychological injury would be sufficiently severe . . . only when there is a substantial impairment of the intellectual, psychological, emotional or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or changes in behavior patterns.

U.S.S.G. § 5K2.3; *see also* U.S.S.G. § 2N1.1, comment. (n.1) (providing that an upward departure may be warranted where offense caused "extreme" psychological injury). The victim letters relied upon by the district court and the Eighth Circuit do not meet this definition and are not

[3] The Petitioner recognizes that Rule 10 of the Supreme Court Rules states that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. This case presents such a rare circumstance due to the nature and extent of the upward departure. Further, given the Eighth Circuit's reinstatement of its entire prior opinion following the remand from this Court, this question is still cognizable for review.

sufficient to establish a basis for an upward departure, or a departure of this magnitude.

The upward departure based on psychological injuries also constitutes impermissible double-counting, in that there was a two level enhancement for vulnerable victims under U.S.S.G. § 3A1.1(b)(1). The application notes to this section specifically reference that the enhancement applies in a situation where an ineffective cancer cure was marketed. U.S.S.G. § 3A1.1, comment. (n.2). The Eighth Circuit rejected this double-counting argument by simply noting that the upward departure based on psychological injuries and the vulnerable victim enhancements "account for different kinds of harm." Pet. App. at 16. The Petition should be granted to provide guidance regarding impermissible double-counting under the advisory guideline scheme. Even after *Booker,* the Guidelines must be calculated correctly.

2. This Case Directly Conflicts with Another Eighth Circuit Opinion Regarding Psychological Injuries

In its original opinion, the Eighth Circuit did not address *United States v. Fawbush,* 946 F.2d 584 (8th Cir. 1991). The *Fawbush* decision involved an upward departure based on psychological injuries to the victims of aggravated sexual assault. In a generalized fashion, the district court in *Fawbush* noted that one of the victims had been in individual and family therapy, and that it was "well-known" that when a victim is of a tender age, the psychological impact is much greater. *See Fawbush,* 946 F.2d at 586. The Eighth Circuit, however, reversed the departure, holding that the record did not provide an adequate basis for departure. *Id.* The Eighth Circuit noted

in *Fawbush* that the record did not contain evidence that either victim suffered psychological harm greater than that normally resulting from a sex offense, and that the evidence of counseling or generalized conclusions by the court regarding the impact supplied an inadequate basis for upward departure. *Id.*

The holding in this case directly conflicts with *Fawbush*. The departure was based on generalized notions about the impact of a tampering offense on the victims, and on generalized statements regarding stress and anxiety. This Court should grant the petition to address the conflict between this case and the Eighth Circuit opinion in *Fawbush*.

2. Upward Departure under Grouping Rules was an Incorrect Application of the Guidelines, Creating an Important Question of Federal Law that Should be Addressed by this Court

The presentence investigation report and the district court determined that there were eight units for the eight product tampering counts. Pet. App. at 8. The Petitioner received a five level enhancement for six units, under U.S.S.G. § 3D1.4, which provides for a five level enhancement for "more than five units" (i.e., six units). The group of adulteration and misbranding counts did not result in any additional units under the provisions of the Guidelines. Pet. App. at 8. As pointed out by the district court, the Guidelines encourage a departure if there are significantly more than five units. Pet. App. at 19. The Petitioner argued as a matter of law that eight units is not "significantly more than five units" to either warrant an upward departure or warrant the extent of the departure.

The Eighth Circuit looked to relevant offense conduct admitted by the Petitioner to suggest that there should have been thirty-four total units. Relying on U.S.S.G. § 1B1.2, the Eighth Circuit concluded that the additional relevant offense conduct should have been treated as if there were 152 counts of conviction for thirty-four total victims, creating a total number of units of thirty-four, which is significantly more than five units to warrant departure. Pet. App. at 10-12.

This constitutes an incorrect application of the Guidelines. The Application Notes to section 1B1.2(c) of the Guidelines state:

> Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be **only one count of conviction.**

U.S.S.G. § 1B1.2(c), comment. (n.3) (emphasis added). Here, there were twenty counts of conviction. This application note suggests that section 1B1.2(c) should only apply if there is one count of conviction. This commentary is binding. *See Stinson v. United States*, 508 U.S. 36 (1993). The Eighth Circuit incorrectly applied the Guidelines in this instance, as there were eight total units. As a matter of law, eight units is "not significantly more than 5 units" to justify an upward departure of this magnitude. The Petition should be granted to provide meaningful guidance to the lower courts concerning the departure encouraged by the grouping provisions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 26, 2005

United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 02-4083

United States of America, Appellee, v. Robert Ray Courtney, Appellant.	* * * * * * *	Appeal from the United States District Court for the Western District of Missouri. [PUBLISHED]

Submitted: September 9, 2003
Filed: April 5, 2004
Vacated: January 24, 2005
Reinstated: June 20, 2005

Before LOKEN, Chief Judge, McMILLIAN and HANSEN, Circuit Judges.

PER CURIAM.

Robert Ray Courtney pleaded guilty to eight counts of product tampering causing serious bodily injury and twelve counts of adulterating or misbranding drugs. The district court[1] sentenced him to thirty years in prison,

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[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

which was a three-level upward departure from his Guidelines imprisonment range. Courtney appealed the extent of the upward departure. After reviewing the reasonableness of the extent of the upward departure and concluding that it was reasonable, we affirmed Courtney's sentence. *United States v. Courtney,* 362 F.3d 497 (8th Cir. 2004).

Courtney petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted his petition, vacated our judgment, and remanded the case for further consideration in light of *United States v. Booker,* 125 S.Ct. 738 (2005). *Courtney v. United States,* 125 S.Ct. 989 (2005).

On remand, Courtney does not raise a Sixth Amendment challenge to his sentence, nor does he challenge the constitutionality of the mandatory Guidelines under which he was sentenced. He argues only that we should review his sentence for reasonableness under *Booker.* Given the nature of his argument, we conclude that Courtney's case is unaffected by *Booker* because (1) our standard of review has not changed and (2) the factual record has not changed.

First, we have held that the pre-*Booker* standard of review for a sentence that resulted from a permissible departure is the same as the post-*Booker* standard of review for all sentences: "whether the sentence imposed by the district court is unreasonable, having regard for the factors to be considered in imposing a sentence, as set forth in 18 U.S.C. § 3553(a); and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of 18 U.S.C. § 3553(c)." *United States v. Dalton,* 404 F.3d 1029, 1032

(8th Cir. 2005) (citing *Booker*, 125 S.Ct. at 765 (internal marks omitted)).

Second, as Courtney concedes, we are limited to the record from his original appeal. (Appellant's Supp. Br. at 6.) Courtney notes certain mitigating factors that he argues fall within § 3553(a): his assistance in creating a substantial restitution pool, his family and community ties and contributions, his surrender of his professional licenses, his cooperation with the government in three criminal cases and one civil case, his lack of criminal history, his sincere remorse, and his adjustment to his conditions of confinement. (Appellant's Supp. Br. at 8, Appellant's Supp. Reply Br. at 13-14.) These facts were brought to the district court's attention in the context of Courtney's motion for a downward departure, which the district court denied when it granted the government's motion for an upward departure. (R. Doc. 119 at 29-33, R. Doc. 128 at 1-6.) These facts were before us in the record in his original appeal.

Thus, given the narrow argument that Courtney makes on remand, we conclude that *Booker* did not change anything about this case factually or legally.[2] The reasonableness inquiry that Courtney would have us undertake here would be an empty exercise because it is identical to the inquiry that we already conclusively resolved against him in the original appeal: we would look to the same factual record, we would apply the same standard of review, and we would review his sentence for reasonableness and

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[2] In light of this disposition, we need not address the government's arguments regarding the partial appeal waiver in Courtney's plea agreement and Courtney's failure to preserve a *Booker*-type claim before the district court or this court.

conclude that it was reasonable. *Courtney*, 362 F.3d at 500-04.

Accordingly, we reinstate our prior opinion and judgment affirming the judgment of the district court. *See United States v. Mohr*, 407 F.3d 898, 899 (8th Cir. 2005) (upon remand by the Supreme Court for further consideration in light of *Booker*, reinstating and refiling the panel's earlier opinion after concluding that the case was unaffected by *Booker*).

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-4083

United States of America, Appellee,	*	
	*	Appeal from the United
	*	States District Court for the
v.	*	Western District of Missouri.
	*	
Robert Ray Courtney,	*	[PUBLISHED]
	*	
Appellant.	*	

Submitted : September 9, 2003
Filed : April 5, 2004

Before LOKEN, Chief Judge, McMILLIAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Robert Ray Courtney, a pharmacist, diluted several chemotherapy drugs before distributing them for administration to cancer patients. His profit-making scheme was detected when one of the doctors who bought from Courtney became suspicious that he was selling more chemotherapy drugs than he was buying from the manufacturers. The doctor took a dose of Taxol that Courtney had recently supplied for one of her patients and sent it to a lab for analysis. The lab reported that it contained 32% of the Taxol it was supposed to contain. The doctor then met with FDA and FBI agents.

The federal agents tested seven additional samples of Gemzar and Taxol that Courtney had supplied for the doctor's patients. They found that the doses contained from 17% to 50% of the chemotherapy drugs they were supposed to contain. The federal agents then had the doctor order doses of Platinol, Zofran, Gemzar, Taxol, and Paraplatin from Courtney using fictitious patient names. Lab testing revealed that these samples contained from 0% to 65% of the dosages that the doctor had ordered and that Courtney had represented they contained.

Authorities executed a search warrant at Courtney's pharmacy, and he was arrested and indicted. He pleaded guilty to eight counts of product tampering causing serious bodily injury, in violation of 18 U.S.C. § 1365(a)(3) (2002), and twelve counts of adulterating or misbranding a drug, in violation of 21 U.S.C. § 331(k).

As part of his written plea agreement, Courtney stipulated to the following factual basis for the eight product-tampering offenses. He diluted a dose of Taxol for each of two patients, resulting in serious bodily injury to them when it was administered. He diluted a dose of Gemzar for each of six patients, resulting in serious bodily injury to them when it was administered. Courtney stipulated to the following factual basis for the twelve adulterating/misbranding counts. When the doctor ordered the chemotherapy for the fictitious patients, Courtney supplied six doses of Gemzar and Taxol, each of which he had adulterated by dilution but mislabeled as undiluted.

Courtney also stipulated to the following crimes beyond his twenty offenses of conviction. As to the eight patients who were named in the product-tampering charges, he diluted fifty additional doses of Gemzar and

Taxol that were administered to them. As to twenty-six more patients who were not identified in the indictment, Courtney diluted 102 doses of Gemzar and Taxol that were administered to them. Courtney also admitted that he had sold stolen Gemzar and Taxol, that he had diluted Platinol and Paraplatin, and that he had caused false Medicare claims to be filed by not disclosing his tampering to the physicians to whom he distributed diluted drugs.

The district court[1] made the following Sentencing Guidelines calculations. Each of the eight product-tampering convictions was placed in a single-count group because each involved a different victim. *See* U.S. Sentencing Guidelines Manual (USSG) § 3D1.2(b) (2000). Each single-count group carried an adjusted offense level of thirty-five: a base offense level of twenty-five, *see* USSG § 2N1.1(a), a four-level enhancement for causing life-threatening bodily injury, *see* USSG § 2N1.1(b)(1)(A), a two-level enhancement because the victims were vulnerable, *see* USSG § 3A1.1(b)(1), a two-level enhancement because there was a large number of vulnerable victims, *see* USSG § 3A1.1(b)(2), and a two-level enhancement for abuse of a position of trust and use of a special skill, *see* USSG § 3B1.3.

The twelve adulterating/misbranding convictions were grouped together. The group carried an adjusted offense level of twenty-four: a base offense level of six, *see* USSG § 2N2.1(a), an eight-level enhancement for the value of the diluted drugs, *see* USSG § 2F1.1(b)(1)(I), a two-level enhancement for more than minimal planning and a

[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

scheme to defraud more than one victim, *see* USSG § 2F1.1(b)(2), a two-level enhancement for the risk of serious bodily injury, *see* USSG § 2F1.1(b)(7)(A), a two-level enhancement because the victims were vulnerable, *see* USSG § 3A1.1(b)(1), a two-level enhancement because there was a large number of vulnerable victims, *see* USSG § 3A1.1(b)(2), and a two-level enhancement for abuse of a position of trust and use of a special skill, *see* USSG § 3B1.3.

Under the grouping rules, the combined offense level was determined by beginning with the offense level, thirty-five, for the group with the highest offense level. Each of the eight product-tampering single-count groups received one unit apiece because they were equally serious. *See* USSG § 3D1.4(a). The group containing the twelve adulterating/misbranding counts received no units because it was nine or more levels less serious than the product-tampering groups. *See* USSG § 3D1.4(c). Although there were eight units, the grouping rules apply a flat five-level offense-level increase regardless of how many more than five units there are. *See* USSG § 3D1.4. Courtney's highest offense level was thus increased by five levels, bringing his combined offense level to forty. He received a three-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, making his total final adjusted offense level thirty-seven. With a Category I criminal history, his Guidelines imprisonment range was 210-262 months.

The district court departed upward by three offense levels to level forty, which carries a Guidelines imprisonment range of 292-365 months, and imposed a 360-month prison sentence within that range. The court justified its upward departure on four grounds: the grouping rules disregarded Courtney's significant number of additional

offenses, Courtney significantly endangered public health, Courtney's conduct caused extreme psychological injury to his victims, and the Guidelines calculations did not take into account Courtney's uncharged criminal conduct. The experienced district judge stated that, in his view, any one of the four grounds was sufficient to justify the three-level upward departure.

Courtney appeals the district court's upward departure. Because we conclude that at least two of the reasons cited by the district court solidly support the three-level upward departure, we affirm.

I.

During the pendency of Courtney's appeal, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003 was enacted. Prior to the PROTECT Act, we would have reviewed the district court's departure under a unitary abuse-of-discretion standard. Subsequent to the PROTECT Act, we review de novo whether the factors upon which the district court relied advance the objectives set forth in 18 U.S.C. § 3553(a)(2), are authorized under 18 U.S.C. § 3553(b), and are justified by the facts of the case. *See United States v. Agee*, 333 F.3d 864, 866-67 (8th Cir. 2003). We may apply the new standard of review to pending appeals, *see United States v. Hutman*, 339 F.3d 773, 775 (8th Cir.), *cert. denied*, 124 S. Ct. 842 (2003), particularly when, as here, stricter scrutiny of the district court's upward departure is to the defendant's advantage. After the PROTECT Act, we continue to review the district court's factual findings for clear error and the reasonableness of a permissible departure

for abuse of discretion. *See United States v. Flores*, 336 F.3d 760, 763 (8th Cir. 2003).

II.

One reason the district court departed upward was that the Guidelines did not provide any incremental punishment for Courtney's seventh and eighth product-tampering convictions, or for his additional uncharged but admitted crimes. "A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s)." USSG § 1B1.2(c). Courtney stipulated in his written plea agreement that he had diluted fifty additional doses of chemotherapy drugs that were administered to the eight patients named in the indictment, and that he had diluted 102 doses of chemotherapy drugs that were administered to twenty-six more patients. Under this provision of the Guidelines, Courtney's Guidelines calculations should have proceeded as if he had been convicted of 152 additional product-tampering charges.[2]

The grouping rules should have been applied to these 152 offenses, along with Courtney's twenty offenses of

[2] Because the presentence report overlooked the proper treatment of these 152 additional offenses, so did the district court. Although this was error, we are satisfied that it was harmless to Courtney. Given that the district court based its upward departure on an undercounted number of offenses, we have no doubt that if presented with the proper count, the court would have departed as far upward as it did. *See Williams v. United States*, 503 U.S. 193, 203 (1992) (when district court misapplies Guidelines, remand is necessary only "if the sentence would have been different but for the district court's error").

conviction. *See* USSG § 1B1.2, comment. (n.3); *United States v. Collar,* 904 F.2d 441, 443 (8th Cir. 1990). When the eight product-tampering counts in the indictment are grouped with the fifty additional product-tampering offenses against the eight victims identified in the indictment, the result is that Courtney has eight multiple-count groups rather than eight single-count groups. *See* USSG § 3B1.2(b). Turning to the 102 product-tampering offenses involving the twenty-six victims not identified in the indictment, these offenses should have been grouped by victim, resulting in twenty-six additional groups. *See id.* The grouping of Courtney's twelve adulterating/misbranding convictions into one multiple-count group would have remained the same. There would have been a total of thirty-four product-tampering groups and one adulterating/misbranding group.

Courtney's combined offense level would have been the same. The adulterating/misbranding group still would have received no units because it was nine or more levels less serious than the product-tampering groups. Each of the thirty-four product-tampering groups would have received one unit apiece because they were equally serious. Although there would have been thirty-four rather than eight units, Courtney still would have received the same five-level offense-level increase under USSG § 3D1.4 that applies regardless of how many more than five units are present.

The district court correctly cited the provision of the Guidelines that specifically authorizes a departure when the flat five-level increase disregards a significant number of units: "Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in

a total of significantly more than 5 Units." USSG § 3D1.4, comment. (backg'd). It is a question of first impression in this circuit how many units are "significantly more than five." A survey of cases from other circuits shows how many units are significantly more than five, and how great of a departure they justify. *See United States v. Wolfe,* 309 F.3d 932, 935 (6th Cir. 2002) (ten units justified two-level upward departure); *United States v. Szabo,* 176 F.3d 930, 933 (7th Cir.) (nine units justified three-level upward departure), *cert. denied,* 528 U.S. 912 (1999); *United States v. MacLeod,* 80 F.3d 860, 865-66, 869 (3d Cir. 1996) (ten units justified two-level upward departure); *United States v. Okane,* 52 F.3d 828, 832-33 (10th Cir. 1995) (ten units justified one-level upward departure); *United States v. Pearson,* 911 F.2d 186, 189-90 (9th Cir. 1990) (eight units justified one-level upward departure); *United States v. Chase,* 894 F.2d 488, 491 (1st Cir. 1990) (fifteen units justified five-level upward departure).

We have no difficulty concluding that Courtney's offenses of conviction, combined with his other admitted relevant conduct offenses, resulted in significantly more than five units.[3] Nor do we have any difficulty concluding that the need to provide incremental punishment for these additional units, viewed alone or in conjunction with the

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[3] Because the eight victims identified in the indictment were used to enhance Courtney's offense level under USSG § 3A1.1(b)(2) (large number of vulnerable victims), he argues that it would be impermissible double-counting to use the units resulting from the offenses against those victims as the basis for an upward departure under USSG § 3D1.4. We may assume without deciding that Courtney is correct because, regardless of whether it was thirty-four units or twenty-six units that went unpunished, we would conclude that either number was significantly more than five units and justified a three-level upward departure.

other basis for departure discussed below in section III of this opinion, fully justified the district court's three-level upward departure.

III.

Another reason the district court departed upward was to account for the extreme psychological harm caused by Courtney's conduct. The district court correctly cited the provision of the Guidelines specifically authorizing such a departure: "The base offense level [for tampering with consumer products] reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense . . . caused extreme psychological injury . . . , an upward departure may be warranted." USSG § 2N1.1, comment. (n.1). The district court accurately noted that Courtney's offense level had been enhanced under USSG § 2N1.1(b)(1)(A) only for causing life-threatening *bodily* injury, such that it would not be double-counting to depart upward on the basis of extreme *psychological* injury. The district court explained:

> Cancer patients understandably suffer from a high degree of anxiety and stress as their lives hang in the balance. Often, their sole hope for survival – not necessarily recovery, but mere survival – depends upon these drugs. The hope is an uncertain one, as there is often no guarantee whether or to what extent the drugs will prove effective in a given case. Early treatment is, as is the case with many diseases, instrumental in determining the ultimate success – and now these patients have learned that they effectively had no treatment whatsoever. Their anxiety and stress has been compounded to a degree beyond

> any possible comprehension: those still living face not only the uncertainty presented by their illness, but the uncertainty as to "what might have been" had Defendant not engaged in criminal conduct – whether they might feel better or live longer, or whether their prognosis would be better had they received the intended medication.

United States v. Courtney, 240 F. Supp. 2d 1052, 1054 (2002).

We agree. The unobjected-to portions of the presentence report are replete with victim-impact statements that illustrate the extreme psychological harm suffered by Courtney's direct victims. A woman who received four diluted chemotherapy doses wrote, "Being diagnosed with ovarian cancer and dealing with the fact that you may not be around to see your kids grow up [is hard enough] without having to deal with someone doing this to you. The fear alone is indescribable. You wonder[,] if you would have gotten the medication you were supposed to have[,] if your cancer would have come back or not." Another woman in the same position wrote, "I have suffered worry, stress[,] and extreme anxiety concerning the recurrence of the disease after the initial period. Would the disease have 'come back' if the initial treatments had been full dosage? We'll *never* know! I have felt intense *anger* and related stress from the knowledge of Courtney's deliberate wrong doing directly related to me. Will I be able to conquer this disease or have his actions reduced my odds in any fashion[?] Will my life be shortened by this crime?" A female victim who received seven diluted chemotherapy doses wrote, "Emotionally, it has affected me the most. It is a very hard thing to deal with. I lose my self control and cry when I think of Courtney – how he would take someone's

life for money." A woman who received two diluted chemotherapy doses wrote, "Lots of sleepless nights. Lots of stress not knowing what [w]as done to my body. If Gemzar had been a regular chemo (not diluted)[,] I wouldn't have pancreatic cancer on my liver now."

A female victim who received seven diluted chemotherapy doses wrote, "This crime takes hope away that the treatment was effective and has created doubt. I feel like I have lost peace of mind because I worry about future occurrences of cancer and if I will receive the correct dosing of medicine." Another female patient wrote, "When I was diagnosed with cancer, I discovered I had to fight an emotional battle as well as a physical one. During this time, I tried to accept that I had a very dangerous set of cells invading my body. Early last fall, I discovered I had another force invading my body. This was one I hadn't counted on. I had to face the reality that someone had purposely diluted the drugs going through my body. I have no idea how it affected my disease, but I felt violated – I felt raped."

A woman who received six diluted doses wrote, "I saw [the doctor] in February of 2001 and began chemo treatments of Taxol and Carboplatin immediately. Because I had responded favorably to these two chemo drugs previously, it was only natural to expect the same response. Unfortunately my health worsened and in March I had to resign from my position [at work]. [The doctor] decided to try a different treatment using Gemzar, but it still didn't improve my situation at all. It wasn't until August of 2001 when I was told I had received diluted chemo drugs from Mr. Courtney's pharmacy that it all made sense why my health was failing. I feel as though my family has been short changed. I feel my whole future has been taken away

from me." These are only some excerpts from the numerous victim-impact statements provided by the direct victims of Courtney's chemotherapy-dilution crimes.

Since this circuit has not previously considered an upward departure under USSG § 2N1.1, comment. (n.1), we have reviewed our cases dealing with other Guidelines provisions authorizing upward departures for extreme psychological injury. *See, e.g., United States v. Thin Elk,* 321 F.3d 704 (8th Cir. 2003); *United States v. Rose,* 315 F.3d 956 (8th Cir.), *cert. denied,* 123 S. Ct. 2238 (2003); *United States v. Hampton,* 260 F.3d 832 (8th Cir. 2001), *cert. denied,* 535 U.S. 1058 (2002); *United States v. Lewis,* 235 F.3d 394 (8th Cir. 2000); *United States v. Sample,* 213 F.3d 1029 (8th Cir. 2000); *United States v. Otto,* 64 F.3d 367 (8th Cir. 1995), *cert. denied,* 516 U.S. 1133 (1996); *United States v. Yellow,* 18 F.3d 1438 (8th Cir. 1994). Having reviewed the facts and legal principles discussed in those cases, we are satisfied that in sentencing Courtney, the district court did not err by departing upward on the basis of the extreme psychological harm his victims suffered. We are further satisfied that this ground for departure, viewed alone or in conjunction with the other basis for departure discussed in section II of this opinion, justified the full extent of the district court's three-level departure. Finally, we reject Courtney's argument that the district court engaged in impermissible double-counting by enhancing his offense level on the basis that the victims were vulnerable and by departing upward on the basis that the victims suffered extreme psychological injury; these Guidelines provisions account for different kinds of harm. *See generally United States v. Fortney,* 357 F.3d 818, 821-22 (8th Cir. 2004) (defining double-counting).

IV.

Accordingly, we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No. 01-00253-01-CR-ODS
ROBERT RAY COURTNEY,	)	
Defendant.	)	

ORDER SPECIFYING REASONS FOR UPWARD DEPARTURE

Earlier today, the Court sentenced Defendant Robert Ray Courtney to a term of imprisonment of 360 months. In so doing, the Court declared that it was departing upward from the Sentencing Guidelines by adding three levels to Defendant's Total Offense Level. The Court identified four grounds that independently justified a three level increase and a fifth that the Court expressly refrained from ruling on. This Order further details the Court's reasoning with respect to the four grounds for departure.

First, for purposes of the grouping rules, Counts One through Eight were treated as separate units for purposes of the grouping rules contained in section 3D1.4. Despite the presence of eight such distinct groups, only five levels could be added to the offense level. Moreover, Counts 9 through 20 were grouped together and had no impact in the guideline calculation because the offense level on those counts was eleven levels lower than offense level for Counts 1 through 8.

The background to section 3D1.4 states that "[i]nasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 units." Elsewhere, the Background also indicates that in unusual cases disregarded counts may justify an upward departure. The possibility for a departure on these grounds was recognized by the Eighth Circuit in *United States v. Brown*, 287 F.3d 684 (8th Cir. 2002). In affirming the district court's decision to depart upward based on section 3D1.4's background statement, the court of appeals noted that the guideline "entirely withdrew from the combined offense level computation" three separate counts of criminal conduct while the evidence indicated that the conduct occurred on different occasions. Here, section 3D1.4 totally disregards the same number of crimes as in *Brown* – Counts 6 through 8 – that involved different victims and were committed at distinct times. In addition, section 3D1.4 totally disregards Counts 9 through 20, which involved Defendant's provision of adulterated and misbranded drugs for fictitious patients during a sting conducted in the course of the Government's investigation.

The Court is mindful that Defendant's adjusted offense level already includes an enhancement under section 3A1.1(b) because there were a large number of vulnerable victims, but an additional increase remains justified. First, the Defendant did not simply commit a single crime that had many vulnerable victims; he committed multiple crimes – most of which targeted a distinct, unique victim. The Defendant is not in the same situation as one who concocts a fraud scheme to which many people fall prey; he consciously decided, on multiple occasions, to

commit an additional crime, knowing that each time he did so another patient was victimized. In addition, most of the patients covered by the Indictment were victimized on multiple occasions. Thus, while his crimes targeted many vulnerable victims, the manner in which he created his victims is singular and unusual, and is not fully contemplated by the enhancement for multiple victims. It is appropriate, as suggested by the Background Notes to section 3D1.4, to depart in situations where there is inadequate scope to insure appropriate additional punishment for the additional crimes Defendant committed.

Second, the Court holds that an upward departure is warranted by virtue of section 5K2.14 because the defendant significantly endangered public health. Defendant has, on 160 different occasions, deprived 34 different people of potentially life-saving or life-prolonging medication, specifically Taxol and Gemzar. Defendant has also admitted to diluting and tampering with other medication (Platinol and Paraplatin), affecting an unspecified number of patients. Finally, Defendant has admitted to selling black market drugs to an unspecified number of consumers. The Court concedes that the very nature of Defendant's crimes implicates public health to a certain degree, but Defendant's crimes have done so to a degree that could not have been anticipated by the Sentencing Commission.

Third, Defendant's conduct posed a unique and substantial risk of psychological injury. There are several guidelines that contemplate these circumstances as justifying an upward departure; the Court will rely on section 2N1.1, Application Note 1, which declares that "[w]here the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property

damage or monetary loss, an upward departure may be warranted." The Court acknowledges that a four level enhancement was imposed under section 2N1.1(b)(1)(A) because victims sustained permanent or life-threatening *bodily* injuries, but the Application Note considers a circumstance not contemplated by the enhancement; namely, extreme *psychological* injury. Cancer patients understandably suffer from a high degree of anxiety and stress as their lives hang in the balance. Often, their sole hope for survival – not necessarily recovery, but mere survival – depends upon these drugs. The hope is an uncertain one, as there is often no guarantee whether or to what extent the drugs will prove effective in a given case. Early treatment is, as is the case with many diseases, instrumental in determining the ultimate success – and now these patients have learned that they effectively had no treatment whatsoever. Their anxiety and stress has been compounded to a degree beyond any possible comprehension: those still living face not only the uncertainty presented by their illness, but the uncertainty as to "what might have been" had Defendant not engaged in criminal conduct – whether they might feel better or live longer, or whether their prognosis would be better had they received the intended medication.

Defendant has relied in part on *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998) in objecting to this ground for departure. *Terry* recognized that the universe of victims includes indirect victims, but held that to be an indirect victim a person had to have a connection to the offense, not merely to a direct victim. Thus, a bank teller on duty at the time of a bank robbery would be an indirect victim, but a family member of one killed by a drunk driver would not be – unless the family member happened to be involved

in or witnessed the incident. 142 F.3d at 711-12 n.17.[1] Assuming that *Terry* is the law of the Circuit, and assuming that the family members in this case are closer to the family members involved in that case (as opposed to the hypothetical described in footnote 17 of that opinion), the record reflects the feelings of and psychological effects upon those receiving Taxol and Gemzar from Defendant. Moreover, Defendant does not seriously dispute that those surviving past the public disclosure of his crimes (including those that unfortunately passed away between that time and today) felt the despair and anguish over the Court described earlier.

Fourth, section 5K2.21 justifies an upward departure. Section 5K2.21 permits a sentence beyond the guideline range to account for uncharged criminal conduct that did not enter into the guideline calculation. As indicated earlier, Defendant admits to having diluted and tampered with other drugs, specifically Platinol and Paraplatin, and to selling black market drugs to consumers. Defendant has also admitted to subjecting 26 additional cancer patients to the same conduct that forms the basis for counts one through eight. In other words, Defendant could have been charged with at least 34 counts of product tampering for providing subpotent Taxol and Gemzar – not just eight counts – as well as charges for selling subpotent Platinol and Paraplatin and black market drugs.

In this regard, Defendant again points to the fact that his sentence was adjusted for the large number of

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[1] *Terry* involved application of section 5K2.3 of the guidelines, but the language in this section is very similar to that contained in the Application Note relied on by the Court.

vulnerable victims pursuant to section 3A1.1(b)(2), but this contention misses the point. The enhancement for the large number of vulnerable victims does not apply to the uncharged conduct, and the uncharged conduct played no part in supporting this enhancement.

Any one of these four factors justifies an upward departure, and the Court concludes that a departure is warranted. The circumstances described above were not adequately taken into account by the Sentencing Commission when the Guidelines were formulated. Some of the circumstances were considered, but not to the degree present in this case. In accordance with the general Policy Statement contained in section 5K2.0, and for the reasons stated earlier, each ground for departure identified above justifies an upward departure of at three levels, resulting in a sentencing range of 292 to 365 months.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES
DISTRICT COURT

DATE: December 5, 2002

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 24, 2005

Mr. James R. Hobbs
Wyrsch, Hobbs & Mirakian, P.C.
1101 Walnut Street
Suite 1300
Kansas City, MO 64106-2122

Re: Robert Ray Courtney
v. United States
No. 04-264

Dear Mr. Hobbs:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit, for further consideration in light of United States v. Booker, 543 U.S. ___ (2005).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or

mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-4083

United States of America,	*	
Appellee,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
Robert Ray Courtney,	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 28, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit